



**Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

## DOCUMENT FOR PUBLIC RELEASE

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**Matter of:** BMAR & Associates, Inc.

**File:** B-281664

**Date:** March 18, 1999

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Joan Fiorino, Esq., Douglas & Barnhill, for the protester.

Richard B. Oliver, Esq., McKenna & Cuneo, L.L.P., James J. Griffin, Griffin Services, Inc., intervenors.

Clarence D. Long, III, Esq., Department of the Air Force, for the agency.

Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Office of Management and Budget Circular No. A-76 and the Circular No. A-76 Revised Supplemental Handbook (March 1996) do not require that the government submit a "technical performance plan" (TPP) for evaluation under the first step of a two-step sealed bidding acquisition to determine the low bid for comparison with the government's in-house bid. The Supplemental Handbook requires a TPP for evaluation purposes only where the private sector proposal is selected for cost comparison on the basis of a negotiated or best value procurement.

2. Protest that fixed-price solicitation for civil engineering services subjects bidders to unreasonable risk due to requirement for lump sum price with no limitation on amount of work that can be ordered under various tasks is sustained where pricing scheme imposes unreasonable risk on the contractors, and thus unduly restricts competition.

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## DECISION

BMAR & Associates, Inc. protests request for technical proposals (RFTP) No. F08651-98-R-0001, issued by the Department of the Air Force for civil engineering services at Eglin Air Force Base in Florida.<sup>1</sup> The acquisition is being conducted as a cost comparison study under Office of Management and Budget

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<sup>1</sup>The services include management of family housing and dormitories, military family housing maintenance, facility maintenance, and repair of facilities and roads at the Eglin Air Force base test range site, waste water treatment plant operation, and the contractor-operated civil engineering supply store. Contracting Officer's Statement at 1; RFTP § C-5.

(OMB) Circular No. A-76 and supplements. Memorandum for all Offerors, Oct. 27, 1998 (issued by contracting officer with RFTP, and hereinafter referred to as Memorandum).

We sustain the protest because we conclude that the lump-sum pricing approach in the RFTP is defective.

The RFTP was issued on October 27, 1998, as the first step of a two-step sealed bidding acquisition under Federal Acquisition Regulation (FAR) § 14.5. Under the first step, interested firms submit technical proposals which are evaluated to determine acceptability. Under the second step, a formal invitation for bids (IFB) is issued only to those firms which have submitted acceptable technical proposals during the first step. Only bids based upon technical proposals determined to be acceptable, either initially or as a result of discussions, will be considered for award; each bid in the second step must be based on the bidder's own technical proposal. Memorandum ¶ 10; FAR § 14.5.

The procedures for determining whether the government should perform an activity in-house, or allow the activity to be performed by a contractor, are set forth in OMB Circular No. A-76, and the Circular No. A-76 Revised Supplemental Handbook (March 1996) (the "Supplemental Handbook"). When an activity is considered appropriate for an in-house versus private-sector cost comparison, the Supplemental Handbook outlines the cost comparison process. Supplemental Handbook ch. 3, § A.3.

For sealed bid procurements,<sup>2</sup> the contracting officer opens the bids, including the government's in-house cost estimate, and enters the price of the apparent low "offeror" on the cost comparison form (CCF). After all necessary adjustments are made and the CCF is completed, the contracting officer announces the tentative decision, subject to evaluation of bids for responsiveness, responsibility, and resolution of possible administrative appeals. Supplemental Handbook ch. 3, § J.1. The Supplemental Handbook establishes an A-76 administrative appeals process for parties seeking to challenge the results of the cost comparison. Supplemental Handbook ch. 3, § K.

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<sup>2</sup>For a negotiated or best value procurement, after selection of the private sector's most advantageous proposal, and all necessary adjustments have been made to ensure that the government's in-house cost estimate and the winning private sector's proposal are based upon the same scope of work and performance standards, the contracting officer completes the cost comparison form and makes the selection decision. Supplemental Handbook ch. 3, § J.3; See NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 4-5.

BMAR maintains that the RFTP violates the requirements for conducting the cost comparison because it does not require the government to submit a "technical performance plan (TPP)"<sup>3</sup> for evaluation under the first step provided for in section H of chapter 3 of the Supplemental Handbook. The Air Force interprets the Supplemental Handbook as requiring a TPP only where the agency conducts a negotiated procurement. According to the Air Force, since this acquisition is a two-step sealed bid, no TPP is required.

At issue is the following language in section H of chapter 3 of the Supplemental Handbook, entitled "Methods of Procurement." The section provides as follows:

1. All competitive methods of Federal procurement provided by the FAR are appropriate for cost comparison under the Circular and this Supplement. This includes: sealed bid, two-step, source selection and other competitive qualifications-based or negotiated procurement techniques.
2. In selecting the method of procurement and contract type, the contracting officer analyzes the PWS [Performance Work Statement] and applies the guidance contained in OFPP [Office of Federal Procurement Policy] Policy Letter 91-2 and FAR Part 16.
3. Source Selection or negotiated procurement techniques may be used for some A-76 Cost Comparisons. To ensure equity in the cost comparison process, the following guidelines are provided:
  - a. In addition to the PWS, Management Plan and in-house cost estimate, the Government, like the private sector offerors, shall submit the Technical Performance Plan required by the solicitation to the A-76 Independent Review Officer (IRO). The Technical Performance Plan reflects the MEO and is sealed prior to the consideration of any part of any contract offer.
  - b. As required by the FAR, the Government should establish a Source Selection Authority, including assurances that there are no potential conflicts of interest in the membership of the Authority.
  - c. The Authority reviews contract and ISSA [Interservice Support Agreement] offers and identifies that offer which represents the "best overall value to the Government." This contract offer competes with the Government's in-house cost estimate.

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<sup>3</sup>The Supplemental Handbook does not define the term "technical performance plan," but states that it "reflects the MEO (most efficient organization)" and is "required by the solicitation." Supplemental Handbook ch. 3, § H.3.a.

We agree with the Air Force that a TPP is not required under a two-step procedure. Section H.1 of chapter 3 of the Supplemental Handbook clearly treats "two-step" as a competitive method different from "source selection . . . or negotiated procurement techniques."<sup>4</sup> The requirement that the government submit a TPP is found at chapter 3, section H.3.a of the Supplemental Handbook, and that provision, by its language, addresses the use of "[s]ource [s]election or negotiated procurement techniques" and sets out guidelines, including the need for a TPP from the government, which apply to source selection or negotiated procurement techniques. This guidance clearly relates to negotiated acquisitions under FAR Part 15, not to sealed bid procurements, including two-step sealed bid procurements.<sup>5</sup>

Further support for the Air Force's position is that the Supplemental Handbook, in discussing the cost comparison process in part II, chapter 3, section B, states that:

2. Contract types.

a. In determining the amount to be recorded as the contract price, consider the contract type. The following guidance is provided in this regard.

b. In the case of a sealed bid, firm fixed price contract, the price of the low responsible, responsive offeror will be entered. If a firm fixed price contract is to be negotiated, the negotiated price will be entered.

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<sup>4</sup>FAR subpart 14.5, two-step sealed bidding, identifies two-step sealed bidding as "a combination of competitive procedures designed to obtain the benefits of sealed bidding . . . ." FAR § 14.501. While step one "consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal," pricing is not involved. Conformity to the technical requirements is resolved in this step. FAR § 14.501(a). Step two involves submission of sealed bids priced by firms which submitted acceptable technical proposals in step one; award is based on the bids. FAR § 14.501(b).

<sup>5</sup>Since the requirement for a TPP appears to apply to all negotiated procurements, it would apply even to those procurements where award is to be made to the firm offering the low-priced, technically acceptable proposal. It is not clear why a TPP would be required in such a procurement, but not in a two-step procurement. While the Air Force suggests that the requirement for a TPP is meant to apply only to negotiated procurements where a cost-technical tradeoff is permitted (that is, "best value" procurements), the Supplemental Handbook does not make that clear.

Here, as in any sealed bid procurement, the price resulting from the two-step process is a sealed bid price, not a price achieved through negotiations under FAR Part 15. The Supplemental Handbook here, again, recognizes the distinction.

Since we conclude that the TPP requirement in the Supplemental Handbook is not applicable to two-step bidding, the Air Force acted consistently with the Supplemental Handbook when it did not require the government to submit a TPP under this RFTP. We note, however, that the government is required to submit information adequate to demonstrate, to the satisfaction of the independent review officer, that the MEO satisfies the requirements of the PWS. See Supplemental Handbook ch. 3, § I.3.a.

BMAR also challenges, for two reasons, the 150-page limitation on technical proposals contained in the RFTP. First, BMAR asserts that the government should prepare a TPP within this page limitation, since otherwise the government will have an unfair advantage, particularly where the government management plan<sup>6</sup> alone will exceed the 150-page limitation. Second, BMAR objects to the page limitation on the basis that it restricts the offeror's ability to address the RFTP requirement to "demonstrate . . . that the proposer not only understands the requirements and commits to fulfilling them, but also understands the challenge of performance and has a sound approach to achieving it." RFTP attach. 2, at 1; Protest at 5-6.

With respect to BMAR's first argument that the government should prepare a TPP within the RFTP's page limitation, this argument is academic because, as discussed above, we concluded that a TPP was not required for this competition. With respect to BMAR's second argument, we think the agency had a reasonable basis to specify a 150-page limitation. The agency points out that in mandating this limitation, it considered that by using two-step sealed bid procedures, the technical proposals in response to the RFTP under step one need only be acceptable to proceed to step two. Offerors would not receive any credit for exceeding or expanding on the requirement; the offerors, as quoted above, need to establish an understanding of, and commitment to, meeting the RFTP requirements. The RFTP also excluded the required quality control plan, resumes, and job descriptions from the page limitation count, which expands the total page count. The agency further conducted a survey of the solicitations for this or a similar type of work and found the average proposal page limitation ranged from 75 to 150 pages, including solicitations involving best value selection criteria where, unlike this acquisition, it would be an advantage for proposals to exceed minimum standards. Under these circumstances, we have no basis to question the agency's 150-page limitation. In

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<sup>6</sup>This document outlines the changes that will result in the government's MEO to perform a commercial activity. It provides the staffing patterns and operating procedures that serve as a baseline for in-house cost estimates. Supplemental Handbook app. 1, Definition of Terms, at 36.

any event, since BMAR's competitors under step one are subject to the same page limitation, we fail to see how BMAR is competitively prejudiced by the RFTP's page limitation.

BMAR also argues that the RFTP does not contain sufficient data on which to base a bid for civil engineer tasks and functions under CLIN 0001. Specifically, BMAR asserts that the RFTP does not contain historical data regarding the scope or frequency of the service calls that have been made in the past for this work or any detailed estimate of the projected future work. Protest at 7-9; Protester's Comments, Jan. 22, 1999, at 11-12. BMAR further argues that, because of the requirement to submit a lump-sum bid for CLIN 0001, the private sector offerors were asked to base their bids on an "ill-defined" RFTP that imposes an unjustifiable amount of risk on them.

At issue here is CLIN 0001,<sup>7</sup> which covers "non-personal services" and requires offerors to:

[p]rovide all personnel, equipment, tools, material, vehicles, supervision, and other items and services necessary to perform Civil Engineer tasks and functions IAW the Performance Work Statement (PWS) and terms and conditions stated herein excluding the Management and maintenance of Military Family Housing and Civil Engineer Supply Store, Annex 1.

RFTP Part I, The Schedule, § B.

Based on the Air Force's estimates, this CLIN represents [deleted] of the cost for CLINs 0001 and 0002 [deleted] for both CLIN. Performance Requirements Summary.

The agency advises that under the PWS, the contractor is required to maintain a recurring work program (RWP) to ensure the maintenance of facilities and real property installed equipment. RFTP attach. 3, PWS, § C-5.12.12. Section C-5.12.12 of the PWS referenced Technical Exhibit 9, which lists "a representative sampling of the RWP requirements for the facilities and infrastructure listed in [technical exhibit] 2," and indicates the frequency of maintenance for each item. Technical Exhibit 9 stated that it was not a complete list of RWP requirements, but that Technical Exhibit 2 contained workload estimates for each functional area.

For example, for facility 8100, maintenance was required on the "emergency light, site A-1, inside facility" on a monthly basis. The agency asserts that based on the RWP, the list in Technical Exhibit 9 and the workload estimate in Technical

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<sup>7</sup>CLIN 0002 covers military family housing. RFTP Part 1, The Schedule, § B.

Exhibit 2, which provides location and frequency of maintenance, an experienced offeror could develop its own RWP by applying time standards (labor hours) to each activity and price each accordingly.

The agency also points out that in addition to the exhibits addressing the RWP, the RFTP included the number, type, and age of facilities, the unit of counts for major items, such as air conditioners, the number of culverts, the number of bridges, and the miles and types of roads. RFTP attach. 3, PWS, technical exhs. The Air Force also provided access to a computer terminal that allowed offerors to obtain information on current work orders. High risk items, such as new construction items, were excluded from the lump-sum CLIN 0001. The cost of materials, a government-reimbursed item, was also excluded from CLIN 0001. Finally, the agency released a document that showed the agency currently is performing the PWS with 200 positions identified by grade. The agency believes that the information it provided in the RFTP is sufficient to permit an offeror to prepare its proposal, and that "although some risk is transferred to the offeror, it is within reasonable bounds." Agency Memorandum of Law at 14.

BMAR's primary concern with the RFTP is the agency's decision to delete the workload estimate for the direct scheduled work (DSW), defined as "[e]mergency, urgent, and routine maintenance and repair work required to keep the facility, appliances, utilities, and installed equipment in such a condition that it may be utilized at its optimal design capacity and efficiency." RFTP attach. 3, PWS, § C-2.2.49. This historical information was included in the draft RFTP, but the Air Force deleted this information from the final RFTP. The protester objects to the deletion of this information as preventing it from competing intelligently.

The record shows that the DSW workload estimates were deleted from the final RFTP because the Air Force concluded that the data could not be relied upon or tracked. Responses/Answers to Contract Inquiries, Nov. 19, 1998. The contracting officer explains that each DSW action represented a group of small jobs. As a result, the DSW data did not provide a record of the true number of services calls (the actual category, type, and number of DSWs). Contracting Officer's Statement at 4. We have no basis to question the agency's decision to delete this information because it was not an accurate record of DSWs. In any event, as the agency points out, the protester has the DSW numbers and is aware of the problem with the reliability of the information. The agency notes that the protester could statistically sample the data and use it in conjunction with other provided information to estimate a more accurate number. Based on this record, we believe the agency made a good faith effort to furnish reliable information in the RFTP; however, this conclusion is not dispositive of the protester's challenge to the RFTP's pricing scheme for CLIN 0001.

In support of its contention that the solicitation's pricing scheme subjects bidders to unreasonable risk and is restrictive, BMAR relies on our decision in Four Star

Maintenance Corp., B-240413, Nov. 2, 1990, 91-1 CPD ¶ 70. In that case, we found that a fixed-price solicitation for family housing maintenance subjected the contractor to unreasonable risk due to requirements for lump-sum prices with no limitations on the amount of work orders under the lump-sum portion of a building maintenance contract. Id. at 3-4. We believe this solicitation suffers from the same defect.

As in Four Star, we find that the pricing structure in this RFTP does not meet the test of reasonableness. As we explained in the referenced decision:

[W]e think that the requirement to perform most of the work under the contract at a fixed monthly price involves risks to the contractor and the government that outweigh any advantage it might offer by deterring some unnecessary work. First, if the contractor builds into its prices contingencies to cover the possibility that the work required will exceed the RFP estimates, and the agency ultimately requires less than the estimated work, the government will pay more for the work than if payment were based upon fixed quantities or unit prices. Under this scenario, the contract would not result in the lowest cost to the government. Conversely, if the contractor bids based on the cost of performing the estimated work, without including the cost of work in excess of the estimates, and the agency ultimately requires work in excess of the estimates, the contractor would be required to perform all additional work at no cost. We think this is unfair and unwarranted where not necessitated by some strong agency need. In addition, the RFP pricing structure affords the government an obvious, and we think improper, advantage in the A-76 cost comparison. As Four Star notes, while the government is required to prepare its offer based upon the same estimated quantities as the other offerors, the government need not increase its price to provide for the contingency that the required work will exceed the RFP estimate. Thus, firms cannot effectively compete with the government under the lump sum pricing scheme.

In sum, since the lump sum pricing scheme . . . may not result in the lowest possible cost to the government; subjects the contractor to inordinate risk; and puts offerors at a competitive disadvantage versus the government in the cost comparison process, it is unreasonable, and as such is inconsistent with the statutory requirement for full and open competition. We have previously recommended to the Air Force that solicitations of this type include estimates of the amount of work expected and provide for unit and extended prices rather than a single fixed price. Offers should be evaluated on the basis of extended prices, and the solicitation should state that payment will be based on the unit prices offered multiplied by the actual quantity of work



required. AWD Mehle GmbH, B-225579, Apr. 16, 1987, 87-1 CPD ¶ 416, recon. denied, B-225579.2, June 11, 1987, 87-1 CPD ¶ 584. This format will help prevent offerors from including in their prices large contingencies to cover the possibility that they may be required to perform work greatly in excess of that listed in the RFP for the fixed price offered and, as a result, likely will reduce the cost to the government. Id.

Four Star Maintenance Corp., supra, at 4-5.

As the Air Force points out, in two subsequent decisions, our Office distinguished the Four Star decision based on our finding that the solicitations in each of those later cases contained reasonable limitations on the amount of work that the selected contractor could be required to perform on a lump-sum basis, and therefore on the amount of risk that the contractor would bear. See Steel Circle Bldg. Co., B-245749, Feb. 3, 1992, 92-1 CPD ¶ 134; Tumpane Servs. Corp., B-242221, Apr. 12, 1991, 91-1 CPD ¶ 369. In those cases, limitations were placed on the amount of potentially expensive work or on the required service calls. One way to prevent unreasonable risk on the contractor is by providing that the fixed price will cover the quantity of service calls estimated in the solicitation and that additional calls will be ordered under a separate, indefinite-quantity line item. See, e.g., J&J Maintenance, Inc., B-272166, July 29, 1996, 96-2 CPD ¶ 56 at 1-2.

Here, the solicitation does not provide a reasonable limitation to the contractor's risk of cost exposure relating to emergency, urgent, and routine service calls, which the record shows represent a significant portion of the contract effort under CLIN 0001. Government Estimate Backup Documents at 39. While quantity estimates may, when reasonably accurate, reduce such risk, that is not the case here where, as discussed above, the historical data for the DSW was unreliable. In fact, the agency performance work statement team found the DSW data for service calls "was way low." Agency Report, Tab 10, E-mail Message, Sept. 8, 1998, at 2. Unlike in the cases cited above, here, the RFTP's bid schedule places no limits on service calls covered by CLIN 0001's fixed price, and the solicitation excludes from CLIN 0001 only a limited number of items to be ordered as indefinite-quantity line items (the costs of these items, primarily relating to new construction, are relatively small compared to the overall [deleted] estimate for CLIN 0001). Further, in response to the protest, the agency provides no reason for adopting this pricing approach. We conclude that the agency has not adequately justified the inordinate risks to the contractor arising from the lump-sum pricing approach, which may, in our view, unduly restrict competition.

Thus, we sustain the protest of CLIN 0001 as defective. We recommend that the agency amend the solicitation in accordance with our decision and the cases cited therein by, for example, placing labor hour or dollar ceilings on the contractor's liability for DSWs under the fixed-price line item. We also recommend that BMAR

be reimbursed for its costs of filing and pursuing the protest of the ground sustained, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1998). BMAR should submit its certified claim for costs, detailing and certifying the time expended and costs incurred, to the Air Force within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

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